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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1928.

No. 306

CARSON PETROLEUM COMPANY,
Petitioner,

versus

LEON C. VIAL, SHERIFF AND TAX COLLECTOR FOR THE PARISH OF ST. CHARLES, LOUISIANA; R. A. DUBROCA, ASSESSOR FOR THE PARISH OF ST. CHARLES, LOUISIANA, ET ALS.,
Respondents.

Brief on Behalf of Respondents to Petition for Certiorari.

HARRY P. SNEED,
Counsel for Respondents.

A. P. FRYMIRE,
R. R. RAMOS,
C. S. LAGARDE,
Of Counsel.

MONTGOMERY-ANDREE PRINTING CO. INC., 420-422 CHARTRES, N.O.

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May It Please the Court:

Respondents submit that neither the application for *certiorari* nor the record herein discloses grounds for the issuance of the writ by this Honorable Court.

STATEMENT OF FACTS.

The statement of facts submitted by petitioner will not at the present time be questioned by respondents, except

to supply important omissions. The oil bought by petitioner in the Mid-Continent Fields is shipped to St. Rose, Louisiana, in tank cars, consigned to the Petroleum Import and Export Corporation, its subsidiary, (R. 13), and transferred from cars to large tanks provided for its reception. The title to the oil is in the Carson Petroleum Company (R. 14). Insurance is carried on the oil for account of Carson Petroleum Company (R. 14), and it remains the property of the Carson Petroleum Company until it actually starts abroad on its foreign journey (R. 15). No oil ever passes through St. Rose on a through bill of lading (R. 14), and the quantity of a foreign shipment is never exactly pre-determined until loading is accomplished, the Carson Petroleum Company having the option of shipping and the buyer taking ten (10%) per cent more or less than his order (R. 10).

BRIEF.

It is thus completely shown that petitioner's plant at St. Rose, Louisiana, is an *entrepot* for the accummulation of oil which is not in transit in either interstate or foreign commerce. The interstate journey is completed when the oil is delivered to the consignee at St. Rose, Louisiana, and placed by it in storage tanks. The foreign journey does not begin until the cargo is determined upon, loaded aboard ship, and consigned to a new consignee. In the meantime, the oil in the tanks at St. Rose, Louisiana, is property at rest in the State of Louisiana, and under the complete control of petitioner, who has retained title thereto. The assessment has been levied on the average quantity of oil there on hand and the quantum thereof is not attacked.

With these facts in mind, respondents submit that the well-considered opinion of the Supreme Court of Louisiana herein (R. 22-13), and the authorities cited, fully dispose of the contentions urged in petitioner's application and brief, the Supreme Court saying:

> (R. 25)—"The interstate and foreign commerce clause of the Federal Constitution does not exempt movable property from state or local taxation, if it is not discriminative, unless the property is in actual transit in interstate or foreign commerce; and the question of continuity of transit which will exempt property moving in interstate or foreign commerce, from state or local taxation, is to be determined by the various factors in the situation, among which are the intention of the owner, the control which he retains to change the destination, the agency or agencies by which the transit is effected, and the cause or occasion or purpose of the interruption during which the property is assessed for state or local taxation. Champlain Realty Co. v. Brattleboro, 260 U. S., 366, 43 Sup. Ct. Rep., 146, 67 L. Ed., 309, 25 A. L. R., 1195.
>
> The mere intention of the owner to export the property, even when coupled with a preliminary shipment in preparation for exportation, does not constitute the beginning of an interstate or foreign shipment. To exempt the property from state or local taxation, it must have been shipped, or entered with a carrier for shipment, to another state or a foreign country, or started on a continuous route or journey beyond the state. Coe v. Errol, 116 U. S., 517, 29 L. Ed., 715, 6 Sup. Ct., 475; Diamond Match Co. v. Ontonagon, 188 U. S., 82, 47 L. Ed., 394, 23 Sup. Ct. Rep., 266; General Oil Co. v. Crain, 209 U. S., 211, 52 L. Ed., 754, 28 Sup. Ct. Rep., 475; Bacon v. Illinois, 227 U. S., 504, 57 L. Ed., 615, 33 Sup. Ct. Rep., 299; Champlain Realty Co. v. Brattle-

boro, 260 U. S., 366; 67 L. Ed., 509, 43 Sup. Ct. Rep., 146, 25 A. L. R., 1195; Rees-Scott Co. v. City of New Orleans, 124 La., 155, 49 So., 1012.

It is not possible to distinguish this case from General Oil Co. v. Crain, *supra*, in the application of the law to the facts of the case. The General Oil Company was a Tennessee Corporation, having its principal place of business in Memphis, and engaged in the business of manufacturing illuminating oils and selling them in other states into which they were shipped. The company's wells and refining plants were in Pennsylvania and Ohio, from which the oils were shipped into the states in which they were sold and used. On account of the tendency of the oils to leak and evaporate and to burst the containers in changes of temperature, it was necessary to ship the oils in railroad tank cars, to the several distributing points throughout the United States, at which the oil was put into barrels or other containers suitable in size for filling orders, which varied in amounts from one barrel upward. It was impracticable to maintain an equipment for the reception and distribution of the oil at every such point at which orders were filled. Memphis was one of such distributing points, to which the oils were shipped from Pennsylvania and Ohio in Tank cars, and at which the oils were unloaded into tanks and put into barrels and other smaller vessels and forwarded to the company's customers in Arkansas, Louisiana, and Mississippi, in which states the company had many regular customers, from whom it always had on hand unfilled orders for oil, to be delivered as soon as possible or convenient. The company conducted also a local business, selling and delivering oil to customers in Memphis, and maintained large tanks, of various sizes, for the several kinds of oil, to be put into barrels or other smaller vessels, to be sold locally or to fill the orders already received from the customers in Arkansas, Louisiana, and Mississippi. For many

years, the company unloaded its oil from its tank cars into the large stationary tanks without attempting to segregate the oil which was sold or intended to be sold locally from that which was to be forwarded to the customers in Arkansas, Louisiana, and Mississippi; and the company paid an inspection fee or tax of 25 cents per barrel, levied by a statute of Tennessee, on all of the oils in the company's stationary tanks in Memphis, whether the oil was intended for sale in Tennessee or in the other states mentioned. Being advised that the oil destined to be shipped and sold outside of the State of Tennessee would not be subject to the local inspection tax if kept separate from the oil sold or intended to be sold in Tennessee, the company inaugurated and maintained a system of segregating the oil that was to be shipped to the customers in Arkansas, Louisiana, and Mississippi, from that which was sold or intended to be sold in Tennessee. A stationary tank, marked plainly and conspicuously "Oil Already Sold in Arkansas, Louisiana, and Mississippi," was maintained, in which alone was kept the oil for which orders had been received from the customers in those states before the oil was shipped from the plants in Pennsylvania and Ohio especially to fill such orders. That oil was unloaded from the tank cars at Memphis into the stationary tank only for the purpose of putting it into the smaller vessels to meet the requirements of the orders which had been received from the customers in Arkansas, Louisiana, and Mississippi, before the oil was shipped from Pennsylvania or Ohio, and was kept separately, in the tank marked "Oil Already Sold in Arkansas, Louisiana, and Mississippi," until put into the smaller vessels and forwarded to the customers in those states. Another stationary tank, marked plainly and conspicuously "Oil to be Sold in Arkansas, Louisiana, and Mississippi," was maintained, in which the oil to be sold in those states, but for which there were no orders received before the oil was shipped in the tank cars from the company's

plants in Pennsylvania and Ohio, was kept separate and apart from all other oil until required for filling orders from the company's customers in those states, and was never sold except on receipt of such orders. Thereafter, the company invoked the commerce clause of the Constitution of the United States, contending that in so far as the inspection fee or tax was sought to be imposed upon the oil in the two tanks marked as we have said it was violative of the 3rd clause of the 8th section of article 1 of the Constitution, giving the Congress the exclusive power to regulate commerce among the several states. The defendant filed a demurrer, attacking the jurisdiction of the court on the ground that the suit was one against the state or against an officer acting by authority of the state. The chancery court overruled the demurrer in so far as the oil in the tank marked "Oil Already Sold in Arkansas, Louisiana, and Mississippi" was concerned, and sustained it in so far as the oil in the tank marked "Oil to be Sold in Arkansas, Louisiana, and Mississippi" was concerned. On appeal, the supreme court of Tennessee decided that the suit was one against the State, and reversed the decree of the chancery court. The plaintiff sued out a writ of error, and the Supreme Court of the United States affirmed the judgment on the ground that "no constitutional right of the oil company was violated by the enforcement of the law" levying the tax. In the course of the opinion, Mr. Justice McKenna, for the court, after reviewing many like cases, including Coe v. Errol, *supra*, and Diamond Match Co. v. Ontonagon, *supra*, said:

> "Like comment is applicable to plaintiff in error and its oil. The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held

there, not in necessary delay or accommodation to the means of transportation, as in State, Dotnold, Prosecutor, v. Engle, *supra*, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the the state beyond a mere halting in its transportation. It required storage there,—the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this. 'Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil'

"This certainly describes a business,— describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary —a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in American Steel & Wire Co. v. Speed, 192 U. S., 500, 48 L. Ed., 538, 24 Sup. Ct. Rep. 365.

"We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. The difference, if any exists, is not necessary to observe. The cases based on the taxing power show

the contentions of plaintiff in error are without merit; in other words, show that its oil was not property in interstate commerce."

The court considered and rejected, in the case just cited, every contention made in the argument of the oil company in the present case, to the effect that the unloading and storing of the oil in the stationary tanks was merely a necessary incident of the business and an unavoidable delay in the transportation of the oil beyond the state.

As to the method of assessing and taxing movable property that is temporarily halted and at rest, between its transportation within and its exportation from the state, it was said in Coe v. Errol, *supra:*

"But, granting all this, it may still be pertinently asked: How can property thus situated, to-wit: deposited or stored at the place of *entrepot* for future exportation, be taxed in the regular way as part of the property of the state? The answer is plain. It can be taxed as all other property is taxed, in the place where it is found, if taxed or assessed for taxation in the usual manner in which such property is taxed, and not singled out to be assessed by itself in an unusual and exceptional manner because of its destination. If thus taxed, in the usual way that other similar property is taxed, and at the same rate and subject to like conditions and regulations, the tax is valid. In other words, the right to tax the property being founded on the hypothesis that it is still a part of the general mass of property in the state, it must be treated in all respects as other property of the same kind is treated.

"These conditions we understand to have been complied with in the present case. At all events there is no evidence to show that the taxes were not imposed in the regular and ordinary

way. As the presumption so far as mode and manner are concerned, is always in favor of, and not against, official acts, the want of evidence to the contrary must be regarded as evidence in favor of the regularity of the assessment in this case."

The oil company, as appellee in this case, relies mainly upon the definitions given in cases involving, not the question of the right of a state to tax property claimed to be moving in interstate or foreign commerce, but the question as to whether the commerce itself—when claimed to be interstate or foreign commerce—is subject to state regulation or subject to Federal regulation. We refer particularly to Swift & Co. v. United States, 196 U. S., 375, 40 L. Ed., 518; Texas & New Orleans Railroad Co. v. Sabine Tram Co., 227 U. S., 111, 57 L. Ed., 442; and Railroad Commission of Louisiana v. Texas & Pacific Railway Co., 229 U. S., 336, 57 L. Ed., 1215. The Supreme Court of the United States, in defining "exports" and in determining when a shipment is in interstate or foreign commerce, has recognized or at least has intimated that the limitation on the power of the states to tax property when halted in an interstate or foreign shipment is not so strict as is the prohibition against any interference with the exclusive power of the Congress to regulate the interstate and foreign commerce itself. For example, in Swift & Co. v. United States, 196 U. S., 400, 49 L. Ed., 526, it is said:

"But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states. Nor do we mean to intimate that the statute under consideration is limited to that point. Beyond what we have said above, we leave

those questions where we find them. They were touched upon in Northern Securities Co. v. United States, 193 U. S., 197, 48 L. Ed., 679, 24 Sup. Ct. Rep., 436."

Accordingly, if the state were attempting, in this instance, to regulate, or to impose a burden, such as a license tax, upon, the business itself which is being conducted by the Carson Petroleum Company, or by the Petroleum Import & Export Corporation, at St. Rose, the case would present a different question—to which the rulings cited by counsel for the Carson Petroleum Company would be *apropos*.

According to the ruling in Coe v. Errol, Diamond Match Co. v. Ontonagon; General Oil Co. v. Crain, and Bacon v. Illinois, *supra*, as distinguished from and approved in Champlain Realty Co. v. Brattleboro, *supra*, the judgment appealed from must be reversed, and the demand of the plaintiff rejected and its suit dismissed."

Respondents respectfully submit that the writ of *certiorari* herein prayed for should be denied.

HARRY P. SNEED,
Counsel for Respondents.

A. P. FRYMIRE,
R. R. RAMOS,
C. S. LAGARDE,
Of Counsel.

Affidavit of Service.

STATE OF LOUISIANA)
PARISH OF ORLEANS)

Harry P. Sneed, being duly sworn, deposes and says that he is one of the counsel for respondents in the above-entitled cause; that on the 31st day of October, 1928, he served a true and correct copy of the foregoing brief by posting same in the United States Post Office at New Orleans, Louisiana, addressed to John K. Murphy, William E. Leahy, Harry A. Newby, and George M. Burditt, Continental Trust Building, Chicago, Illinois, in a securely sealed wrapper with postage prepaid, and by personally delivering a copy thereof to the office of Harold A. Moise, Whitney Central Building, New Orleans, Louisiana, all of the above being opposing counsel herein, and the addresses given being their true and correct addresses.

HARRY P. SNEED.

Subscribed and sworn to before me by Harry P. Sneed on this the 31st day of October, 1928.

WILLIAM J. KEARNEY, JR.,
Notary Public.

(Seal)

William J. Kearney, Jr.